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Supreme Court, U.S.
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No. 02-1295

IN THE

Supreme Court of the United States

THE CITIZENS BANK,
Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF FOR ALABAMA BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court has *sub silentio* overruled the long-standing requirement under the *Wickard v. Filburn* line of cases, under which intrastate commercial transactions must be aggregated to determine if they have a substantial effect on interstate commerce, such that Congress cannot regulate under the Federal Arbitration Act an intrastate commercial loan agreement between a federally regulated bank and a construction company.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Alabama Bankers Association ("ABA") is the principal trade association of the banking industry in the State of Alabama. It has members that conduct banking operations in small communities, throughout the State of Alabama, and regionally in numerous States. Birmingham, Alabama is the fourth largest banking city in the nation in terms of bank assets headquartered in the city.

The ABA frequently appears in litigation as *amicus curiae* where the issues raised are of widespread importance and concern to banks, consumers of banking services, and the business community in general. Many ABA members regularly include arbitration agreements in their loan documents and deposit and business contracts.

Pursuant to Supreme Court Rule 37.2(a), the ABA has conferred with the parties regarding the filing of this brief *amicus curiae*, and both parties have consented to its filing. Evidence of the written consent of the parties has been filed separately herewith.

The ABA respectfully submits this brief in support of the petition for writ of certiorari filed by Petitioner, The Citizens Bank.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for writ of certiorari to resolve the conflict between the decision of the Alabama Supreme Court, refusing to apply the clear and long-standing aggregation test for determining whether a commercial transaction substantially affects interstate commerce and is

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. Petitioner, The Citizens Bank, is a member of the *amicus curiae*.

subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, and the decisions of this Court, another state court of last resort, and the courts of appeal. Moreover, this Court should grant the petition for writ of certiorari to quash a rapidly expanding body of Alabama case law that rejects Congress' power to regulate our national economy via the FAA.

While acknowledging that *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), held that the FAA applies to the *full extent* of the Commerce Clause, the Alabama Supreme Court nonetheless has issued a line of decisions limiting the Commerce Clause's reach in arbitration cases. The Alabama court has premised these decisions on the erroneous conclusion that *United States v. Lopez*, 514 U.S. 549 (1995), overruled this Court's long-standing Commerce Clause test announced in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* established that a purely intrastate economic activity (*i.e.*, the production of wheat on a farm for personal consumption) is subject to Congress' commerce power if that activity, when aggregated with similarly situated activities throughout the nation, substantially affects interstate commerce. Applying long-abandoned New Deal-era Commerce Clause rationale, the Alabama Supreme Court concluded that *Lopez* eliminated the requirement to apply the *Wickard* aggregation test and, thus, the FAA to contracts evidencing intrastate economic activities.

Contrary to the Alabama Supreme Court's holding, however, *Lopez*, 514 U.S. at 561, limited the *Wickard* aggregation test only with respect to *non*economic activities. While the *Lopez* Court held that a *non*economic activity (*i.e.*, possession of a firearm) was not subject to the Commerce Clause, it expressly recognized the continuing application of the Commerce Clause to intrastate *economic* activities "which viewed *in the aggregate*, substantially affect[] interstate commerce." *Id.* (emphasis added).

For economic activities, *Lopez*, 514 U.S. at 559-60, and *United States v. Morrison*, 529 U.S. 598, 610 (2000), confirmed that aggregation remains the rule, citing numerous aggregation precedents with approval, including *Wickard* and *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, *id.* at 154, this Court held that two "*purely intrastate*" loans of money by an individual "loan shark" to a business fell within Congress' commerce power because the "class of activities regulated" (*i.e.*, similarly situated loan transactions in the aggregate) sufficiently affected interstate commerce. (Emphasis added). The facts of this case (*i.e.*, commercial bank loans) are much stronger than those in *Perez*.

The Texas Supreme Court and the Eleventh Circuit have recognized the continuing efficacy of the *Wickard-Lopez* aggregation test. The Supreme Courts of Alabama and Montana have reached the opposite conclusion.

Indeed, the Alabama Supreme Court's holding in this case is a continuation of that court's repeated history of anti-FAA rulings and is part of a rapidly expanding body of Alabama case law that rejects Congress' power to regulate, through the FAA, numerous types of intrastate commercial transactions. This underscores the need to grant the petition for writ of certiorari in order to resolve the conflicts and reestablish a uniform application of the FAA among the States.

ARGUMENT

I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT CREATED BY THE ALABAMA SUPREME COURT'S DECISION THAT *LOPEZ* OVERRULED LONGSTANDING DECISIONS OF THIS COURT FOR DETERMINING WHEN INTRASTATE COMMERCIAL TRANSACTIONS SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

A. The Alabama Supreme Court Held that *Lopez* Revived an Abandoned New Deal-Era Test for Determining Whether Commercial Transactions Substantially Affect Interstate Commerce.

In *Alafabco v. Citizens Bank*, No. 1010703, 2002 WL 1998268 (Ala. Aug. 30, 2002), the Alabama Supreme Court refused to apply the FAA to two commercial loan restructuring contracts entered into by Citizens Bank and Alafabco, a construction company. The Alabama Supreme Court applied a long-abandoned, New Deal-era test under which the loan transactions at issue and the incidental interstate activities of the parties[2] were not aggregated with other similarly situated commercial loan activities and thus had only an indirect effect on interstate commerce. *Id.* at *4.

[2] The Alabama court concluded that "the facts that the Bank 'routinely conducts business in interstate commerce'; that Alafabco owns and uses materials 'manufactured outside the state of Alabama'; and that Alafabco operates its business with funds borrowed from the Bank cannot support arbitrability of this dispute." *Alafabco*, at *5. The Alabama Court viewed the loan transactions themselves as intrastate activities. *Id.* at *7. Although ABA disagrees with this characterization, under this Court's aggregation requirement, the intrastate characterization is not constitutionally determinative. *See Wickard*, 317 U.S. at 127-28.

In refusing to apply the aggregation test, the Alabama Supreme Court relied on its previous decision in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000). In *Sisters of the Visitation*, the Alabama court concluded that *Lopez* restricted the application of *Wickard's* aggregation requirement, stating:

> [W]e conclude that the question whether the actions of an individual, which actions standing alone would be considered "local" actions or actions with only an "*indirect*" influence on interstate commerce, may be considered to have a substantial influence on interstate commerce is to be determined by considering *how critical the regulation of all similarly situated persons' activity is* to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce.

Id. at 764 (emphases added). The Alabama court concluded that the regulation of intrastate commercial activities is not "critical" to the FAA because excluding intrastate activities from the Act's reach still would afford the FAA a field of operation over interstate transactions. *Id.* at 764-65. Thus, the Alabama court used a Commerce Clause test resembling the New Deal-era "direct" versus "indirect" effects test, under which the court examined:

> (1) the 'citizenship of the parties,' (2) the origin of any 'tools and equipment' actually used in the transaction, (3) the 'allocation of cost of services and materials,' (4) the 'subsequent movement across state lines' of the 'object of the services,' and (5) the 'degree of separability from other contracts.'

Alafabco, at *4 (quoting *Sisters of the Visitation*, 775 So. 2d at 765-67).

Employing this non-aggregation test to Citizen Bank's commercial loan restructuring agreements, the Alabama Supreme Court held that the FAA was not applicable because:

> [T]he parties in this case are Alabama residents. The Bank did not show that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects. Consequently, the Bank failed to carry its burden of proof on the interstate-commerce issue.

Id. at *8. The Alabama court rejected as irrelevant Citizens Bank's argument that the loan transactions arose out of or were connected with the parties' general interstate business dealings. *Id.* at *5. Because the Alabama court concluded that the specific commercial loan restructuring transactions themselves did not directly involve the interstate transfer of funds or the funding of a project to be completed out-of-state, but had only an indirect effect on interstate commerce, it held that the FAA was inapplicable. *Id.* at *8.

As pointed out by Justice See in his dissent, had the Alabama Supreme Court applied the *Wickard-Lopez* aggregation test, it would have had to hold that the FAA applied to the underlying commercial loans because those loans, when aggregated with all similarly situated commercial loans, substantially affected interstate commerce. *See Alafabco, id.* at *8 (*See*, J., dissenting).

B. The Alabama Supreme Court's Decision Directly Conflicts with this Court's Decisions in *Allied-Bruce*, *Wickard*, *Lopez*, and *Morrison*

Contrary to the Alabama Supreme Court's conclusion that application of the FAA to intrastate transactions is not "critical" to that Act's purpose, this Court in *Allied-Bruce*, 513 U.S. at 279, stated that "[t]he Act's history ... indicates

that the Act's supporters saw the Act as part of an effort to make arbitration agreements *universally enforceable*." (Citing *Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess., at 16 (1924)) (emphasis added).

The FAA provides in pertinent part that a "written provision in . . . a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2 (emphasis added). In *Allied-Bruce*, 513 U.S. at 277, this Court concluded that the FAA's use of "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power *to the full*." (Emphasis added.) Since 1937, Congress' commerce power has reached economic activities with minor interstate connections and economic activities that are purely intrastate.

Prior to 1937, during the New Deal-era, the Court restricted the reach of Congress' commerce power to intrastate economic activities by using rigid formalistic tests (*e.g.*, the "direct" versus "indirect" effects test) that invalidated a plethora of federal commercial legislation. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 307-10 (1936) (striking down portions of Bituminous Coal Conservation Act).[3] The Supreme Court eventually abandoned the "direct" versus "indirect" effects test and the other formalistic tests for determining whether an intrastate activity was subject to

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[3] *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (striking down a wage and hour provision of the National Industrial Recovery Act that had "no direct relation to interstate commerce").

federal regulation under the Commerce Clause. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).[4]

In *Wickard*, 317 U.S. at 125, the Court held that a farmer's growing of wheat for personal consumption was within Congress' commerce power. The Court explained that an aggregation test must be used, stating:

> [E]ven if [the farmer's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."
>
> . . . .
>
> That [the farmer's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

Id. at 125, 127-28.

In *Perez*, 402 U.S. 146, this Court upheld congressional regulation of loan sharking. In applying the *Wickard* aggregation test to "purely intrastate" loans from an individual to the operator of a butcher shop, the Court emphasized that the Commerce Clause focuses on the "class of activities regulated" and the "'total incidence' of the practice on commerce." *Id.* at 154 (quoting *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964)). *See generally Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) ("[W]here a general regulatory statute bears a substantial relation to commerce,

[4] In *Jones & Laughlin Steel Corp.*, 301 U.S. 1, the Supreme Court upheld a federal statute guaranteeing collective bargaining for employees engaged in the manufacture of goods to be shipped in interstate commerce.

the *de minimis* character of individual instances arising under that statute is of no consequence.").

If Congress' commerce power extends to the loans made by an individual to the operator of a butcher shop in *Perez*, it also extends to loans made by the federally regulated bank to the construction business in this case.

Despite the Alabama Supreme Court's holding to the contrary, *Lopez* restricted application of the aggregation test only to *non*economic activities, and not to economic activities, like loans. In *Lopez*, 514 U.S. at 558-59, this Court summarized its post-*Wickard* Commerce Clause jurisprudence, stating:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce. . . .

(Citations omitted.) The *Lopez* Court further recounted:

> [W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; *Hodel* [*v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)], *intrastate* extortionate *credit transactions*, *Perez*, *supra*, restaurants utilizing substantial interstate supplies, *McClung*, *supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, [*Inc. v. United States*, 379 U.S. 241 (1964)], and production and consumption of homegrown wheat, *Wickard v. Filburn*. . . . These examples are by no means exhaustive, but the

> pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Id., 514 U.S. at 559-60 (emphases added).

To remove any doubt as to the continuing efficacy of the aggregation test to economic activities, the *Lopez* Court stated that, unlike the commercial regulatory statutes listed above, a statute criminalizing the mere possession of an inanimate object, a firearm:

> cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed *in the aggregate*, substantially affects interstate commerce.

Id., 514 U.S. at 561 (emphasis added).

Despite the Alabama Supreme Court's holding that *Lopez* had limited the application of *Wickard* even for economic activities, this Court in *Morrison*, 529 U.S at 610, 617, reconfirmed the application of the aggregation principle of *Wickard* for economic activities. While this Court "reject[ed] the argument that Congress may regulate *non*economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," this Court again expressly approved *Perez*, which aggregated economic activities—loans. *Id.* at 610, 617 (emphasis added.). Moreover, this Court reiterated that it has consistently "sustained federal regulation under the *aggregation principle* in *Wickard* . . . [where] the regulated activity was of an apparent commercial character." *Id.* at 611 n.4 (emphasis added).

Bank loans have a "commercial character." Bank loans are economic activities. Indeed, it is difficult to posit a more "commercial" or "economic" activity than a commercial bank loan. Federal regulation of bank loans promotes stability in our national economy.

The aggregation principle that was established in *Wickard*, applied specifically to the loans of money in *Perez*, confirmed in *Lopez*, and reconfirmed in *Morrison*, applies to the commercial loans made by Citizens Bank to Alafabco in this case. When the commercial loan restructuring transactions between Citizens Bank and Alafabco are aggregated with similarly-situated commercial loans throughout the country, they "substantially affect interstate commerce." The Alabama Supreme Court's holding to the contrary conflicts with more than half a century of this Court's Commerce Clause precedents and with *Allied-Bruce,* 513 U.S. at 277, which expressly held that the FAA "exercise[s] Congress' commerce power *to the full*." (Emphasis added.)

II. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE ALABAMA SUPREME COURT'S AND THE MONTANA SUPREME COURT'S DECISIONS ABANDONING THE *WICKARD-LOPEZ* AGGREGATION RULE AND THE TEXAS SUPREME COURT'S AND THE ELEVENTH CIRCUIT'S DECISIONS ADHERING TO THAT RULE.

In addition to conflicting with the FAA and Commerce Clause decisions of this Court, the Alabama Supreme Court's holding in this case mirrors an incorrect decision of the Montana Supreme Court and conflicts with decisions by the Texas Supreme Court and the Eleventh Circuit that follow this Court's precedents.

In *City of Cut Bank v. Tom Patrick Construction Co.*, 963 P.2d 1283, 1286 (Mont. 1998), the Montana Supreme Court, like the Alabama Supreme Court, incorrectly concluded that this Court's holding in *Lopez*—that an activity must "*substantially* affect interstate commerce"—modified *Allied-Bruce* and thus the reach of the FAA. Instead of applying the *Wickard-Lopez* aggregation test, the Montana court held that

a largely intrastate construction contract was not subject to the FAA because it "was a local transaction, not involving interstate commerce . . . ." *Id.* at 1287.

The Alabama Supreme Court's decision in this case and the Montana Supreme Court's decision in *Tom Patrick Construction* directly conflict with the Texas Supreme Court's decision in *In re L&L Kempwood Associates, L.P.*, 9 S.W.3d 125 (Tex. 1999). In *Kempwood*, *id.* at 127, the Texas Supreme Court rejected the argument that *Lopez* restricted the reach of the Commerce Clause and the FAA with respect to economic activities, stating that "*Lopez*, decided April 26, 1995, did not cite *Allied-Bruce*, decided January 18, 1995, or suggest in any way that it had changed its view of Congress's commerce power over economic activities." [5] Thus, the Texas court correctly applied the FAA to a largely intrastate construction contract. *Id.*

Similarly, the Alabama Supreme Court's non-aggregation decision for commercial transactions conflicts with the Commerce Clause decisions of the United States Court of Appeals for the Eleventh Circuit. In *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001), the Eleventh Circuit rejected the argument that *Lopez* or *Morrison* restricted the reach of the Commerce Clause with respect to economic activities and upheld the application of the Hobbs Act to a robbery. The Eleventh Circuit explained that the statute "struck down in

[5] Since *Lopez*, other state courts also have refused to apply the FAA to intrastate commercial transactions. *See, e.g., Wien & Malkin, LLP v. Helmsley Spear, Inc.*, 751 N.Y.S.2d 21, 22 (N.Y. App. Div. 2002) (holding that because "the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply") (citing *Lopez* and *Allied-Bruce*); *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 34 P.3d 870 (Wash. App. 2001) (holding that post-*Lopez*, the FAA did not apply to the intrastate sale of condominiums).

Lopez . . . attempted to regulate *non*-economic criminal conduct." *Gray*, 260 F.3d at 1273 (emphasis added). In contrast, the court of appeals recognized that "under the aggregation theory, economic activity that may not itself substantially affect interstate commerce may be regulated under the Commerce Clause if that conduct, in the aggregate, would have such a substantial effect." *Id.* n.2 (Citing *Wickard*, 317 U.S. at 127-28). *See, e.g., United States v. Peterson*, 236 F.3d 848, 852 (7th Cir. 2001) (holding that after *Lopez* and *Morrison*, aggregation is still appropriate for robberies that interfere with economic activity).

III. CERTIORARI IS WARRANTED ON THIS IMPORTANT QUESTION OF FEDERAL LAW TO QUASH THE GROWING BODY OF CASE LAW THAT IS CARVING OUT SUBSTANTIAL CLASSES OF COMMERCIAL TRANSACTIONS FROM THE REACH OF THE FEDERAL ARBITRATION ACT.

A. The Alabama Supreme Court Continues Its History of Anti-FAA Rulings.

The Alabama Supreme Court's rejection of this Court's FAA and Commerce Clause precedents in this case represents the continuation of the Alabama court's history of anti-FAA rulings. For example, in *Ex parte Alabama Oxygen*, 433 So. 2d 1158 (Ala. 1983), the Alabama court held that the FAA did not preempt state law that barred enforcement of pre-dispute arbitration agreements. The Alabama court noted Alabama's policy and statute barring enforcement of pre-dispute arbitration agreements and held that "[e]ven if Congress had the power to regulate under the Commerce Clause, such regulation would, under the circumstances here presented, constitute a violation of state rights pursuant to the Tenth Amendment." *Id.* at 1163. This Court vacated the Alabama Supreme Court's opinion and remanded in light of

Southland Corporation v. Keating, 465 U.S. 1 (1984). *See York Int'l v. Alabama Oxygen, Inc.*, 465 U.S. 1016 (1984). In *Southland*, 465 U.S. at 14, this Court held, contrary to the Alabama Supreme Court, that the FAA preempted state law and thus must be applied by state courts.

Next, in *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993), the Alabama Supreme Court narrowly construed the language of the FAA to hold that the Act did not apply to a termite bond issued by a pest control company to a homeowner. The Alabama court's holding that the FAA was inapplicable to the termite bond contract was premised on its conclusion that the parties had not "contemplated substantial interstate activity when they entered the termite bond." *Id.* at 356. Recognizing the impact of such a narrow construction of the FAA on Congress' power to regulate commerce, this Court granted certiorari and reversed the Alabama court, holding that the FAA could not be restricted by the "contemplation of the parties" test. *Allied-Bruce*, 513 U.S. at 265. This Court explained that the "basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 270. This Court held that the FAA's scope encompasses the "exercise [of] Congress' commerce power to the full." *Id.* at 277.

While in *Alabama Oxygen* and *Allied-Bruce* the Alabama Supreme Court misconstrued states' rights theory, the 10th Amendment, and the language of the FAA to avoid the application of that Act to the full extent of the Commerce Clause, the Alabama court's current approach is to employ its own aggressive interpretation of federalism to misconstrue the Commerce Clause itself when applied to the FAA.

In *Sisters of the Visitation*, 775 So. 2d at 764, the Alabama Supreme Court stated:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an *indirect connection* to interstate commerce, come within the scope of the FAA, that Act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the *doctrine of federalism*, making that doctrine a hollow shell.

(Emphases added.) Thus, under its interpretation of federalism, the Alabama Supreme Court has, in effect, employed the New Deal-era "direct" versus "indirect" effects test to determine whether the FAA applies to any given contract. *See Carter Coal*, 298 U.S. at 307-10.[6]

Applying this erroneous test to this case, the Alabama Supreme Court disregarded the general interstate activities of Citizens Bank and Alafabco, refused to apply *Wickard-Lopez* aggregation to the intrastate loans, and held that the FAA was inapplicable to commercial loan restructuring contracts. *Alafabco*, at *8.

B. The Alabama Supreme Court is Expanding the Categories of Commercial Transactions No Longer Subject to Congressional Regulation Under the FAA.

Today in Alabama, state courts do not enforce the FAA in contracts evidencing the following types of intrastate economic activities: (1) remodeling of buildings, construction of houses, and purchases of condominiums, *Sisters of the Visitation*, 775 So. 2d 759; *Brookfield Constr. Co. v. Van Wezel*, No. 1010353, 2002 WL 1397986 (Ala. June 28, 2002); *Ex parte Learakos*, 826 So. 2d 782 (Ala. 2001), *Ex parte Kampis*, 826 So. 2d 819 (Ala. 2002), *Aronov Realty Brokerage, Inc. v. Morris*, No. 1001292, 2002 WL 734345

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[6] *See generally* Lea Richmond IV, Comment, *Sisters of the Visitation v. Cochran Plastering Co.: Earnest Federalism or Reconstructive Defiance to the Federal Arbitration Act*, 25 Am. J. Trial. Advoc. 633 (2002).

(Ala. April 26, 2002); [7] (2) retaliatory discharges of employees who file workers' compensation claims, *Liberty National Life Ins. Co. v. Douglas*, 826 So. 2d 806 (Ala. 2002);[8] (3) purchases of used cars, *McConnell Auto. Corp. v. Jackson*, No. 1010006, 2002 WL 31439766 (Ala. Nov. 1, 2002); [9] (4) making of consumer loans by finance companies, *Alternative Fin. Solutions, LLC v. Colburn*, 821 So. 2d 981 (Ala. 2001); [10] and (5) making of commercial loans by federally regulated banks, *Alafabco*, No. 1010703, 2002 WL 1998268.[11]

Indeed, even since its decision in *Alafabco*, the Alabama Supreme Court has decided two additional cases that reject this Court's FAA precedents. In *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 WL 604037 (Ala. Feb. 28, 2003), the Alabama court effectively rejected this Court's ultimate holding in *Allied-Bruce* that the FAA applies to a termite contract performed in Alabama, concluding that post-*Lopez* the FAA does not apply to a termite contract performed

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[7] *But see generally, e.g., Meyer v. Holley*, 123 S. Ct. 824 (2003) (applying the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, which is premised upon Congress' commerce power, to the purchase of a house).

[8] *But see generally, e.g., Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002) (applying the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, which is premised upon Congress' commerce power, to claims for injury arising out of the workplace).

[9] *But see generally, e.g., Reno v. Condon*, 528 U.S. 141 (2000) (applying the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721—2725, which is premised upon Congress' commerce power, to the sale of information regarding the registration of automobiles).

[10] *But see generally, e.g., Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981) (applying the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, which is premised upon Congress' commerce power, to consumer loans).

[11] *But see generally, e.g., Hudson v. United States*, 522 U.S. 93 (1997) (applying Federal Reserve Deposit Insurance Act, 12 U.S.C. § 1818, which is premised upon Congress' commerce power, to officers of a bank that made commercial loans).

in Alabama. Because Bowen's termite treatment contract itself did not substantially affect interstate commerce, the Alabama court held that it fell outside Congress' commerce power. *Id.* at *2. The Alabama Court acknowledged that the pest control company generally purchased pesticide and tools from out of state, but concluded that because these items were not "purchased with [Bowen's] contract in mind," they were insufficient to invoke the FAA. *Id.* Justice See again dissented, stating that aggregation was required and that the direct versus indirect test had long been abandoned. *Id.* at *4, *5 (See, J., dissenting).

Further, in *Ex parte Webb*, No. 1000651, 2003 WL 378356 (Ala. Feb. 21, 2003), the Alabama Supreme Court effectively rejected this Court's decision in *Circuit City v. Adams*, 532 U.S. 105 (2001), applying the FAA to an intrastate employment contract, concluding that post-*Lopez* the FAA does not apply to an intrastate employment contract performed in Alabama. Because Webb's employment agreement did not itself substantially affect interstate commerce, the Alabama court concluded that the transaction was outside the scope of Congress' commerce power. *Id.* at *5. The Alabama Supreme Court acknowledged that the employer made general purchases of inventory and parts for resale "from out-of-state suppliers and vendors," but relied on *Alafabco* to conclude that they were insufficient to bring the transaction at issue within the scope of the Commerce Clause and, thus, the FAA. *Id.* (quoting *Alafabco*, at *5). However, as this Court recognized in a prior case:

> It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in

> commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 [, 127-28] (1942):
>
> > "That [the farmer's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

McClung, 379 U.S. at 300-01.

CONCLUSION

This Court should grant the petition for writ of certiorari to resolve the conflict between the decision of the Alabama Supreme Court and decisions of this Court, and other state and federal courts, and to reestablish the uniform application of the FAA. Neither this Court's recent federalism jurisprudence in general, nor its economic-focused Commerce Clause jurisprudence in particular, prevents Congress from regulating a commercial bank loan. Unlike the Alabama Supreme Court, this Court has not revived a New Deal-era restrictive test to negate the FAA, which, like a plethora of other federal legislation, is premised upon Congress' "Power . . . [t]o regulate Commerce . . . among the several States."

Respectfully submitted,

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